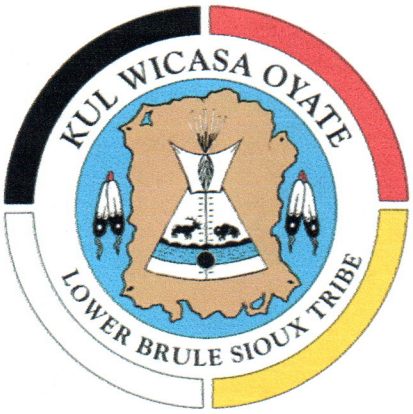
Boyd I. Gourneau
Chairman



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June 15, 2017

Ajit Pai, Chairman
Federal Communications Commission
445 12th Street, NW
Washington, DC 20554

Lower Brule Sioux Tribe Comments to the FCC on 47 CFR Parts 1 and 17 [WT Docket No. 17–79; FCC 17–38] Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment

Dear Sir:

The Lower Brule Sioux Tribe believes that the Notice of Rulemaking is completely one-sided, taking into account only the perspective and the problems that industry experiences with the TCNS system. Lower Brule and other Tribal nations have their own points of view and experience similar problems that are addressed in this Notice, however the Notice of Rulemaking reflects no tribal input. Both industry and Tribes see a clear need for consistency and some uniformity. The TCNS system works – and works well.

The FCC in the early 2000's took a leadership role in developing relationships with Tribes, culminating in a nationwide Programmatic Agreement (PA). The PA was originally developed to adhere to Executive Order #13175, and to ensure compliance with Section 106 of the National Historic Preservation Act. The TCNS system grew out of that original Agreement. Tribal Nations over the last 10 years have promoted the FCC working relationship with the Tribes as a role model for other Federal agencies.

The Nationwide Programmatic Agreement was developed by a Working Group of tribal and industry representatives, the Advisory Council on Historic Preservation and FCC staff. The Lower Brule Sioux Tribe recommends that the same approach be used to address the current problems we all (Tribes and Industry) experience with the TCNS system which are reflected in the Notice of Rulemaking. The goal of the proposed Work Group would be to create consistency and streamline the TCNS process while maintaining the integrity of the current process and continuing to comply with Federal statutes. In this way, issues such as costs, billing for fees, and delays, could be efficiently worked out. The Work Group could be focused nationally or regionally. As all of the issue/problems are clear and all parties agree on the

issues that need to be addressed, Lower Brule believes that a Work Group forum could resolve issues within a relatively short period of time.

There are many Tribal nations involved in the TCNS process, covering and cross-covering a vast territory. It is unfortunate that a small percentage of these nations [and some industry partner consultants] have created skepticism and mistrust of a process that for the last 10 years has worked extremely well.

As discussed in the tribal consultation meeting in Mission, SD on June 8th, 2017, the myrid of questions contained in the Notice are too numerous to address with a short time frame and a very small staff. What follows are more specific comments, which we have tried to respond to [to the extent we are able] by group, using the groupings that were identified for us and passed out at the FCC Tribal Consultation meeting in Mission, SD on June 8, 2017.

In addressing the comments, we are convinced that a more appropriate way to resolve the valid issues that the Notice of Rulemaking addresses is through the format of a Working Group as recommended above, and as was discussed at the tribal consultation meeting last week.

We appreciate your consideration.

Sincerely,

for Boyd I. Gourneau
Chairman

Attachment

Attachment 1.

Lower Brule Sioux Tribe Responses to Specific Questions in: FEDERAL COMMUNICATIONS COMMISSION, 47 CFR Parts 1 and 17, [WT Docket No. 17–79; FCC 17–38], Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment

Paragraph 24.

At what point in the Tower Construction Notification System (TCNS) process, if any, might a Tribal Nation act as a contractor or consultant?

As celltower construction necessarily impacts the traditional lands of Tribes and falls within their traditional domain of ownership, Tribes expect to be approached at the beginning of the process, to ensure that their interests are served in any undertaking, just like private landowners in the modern sense. All territory proposed for celltower project construction is the traditional territory of one or more Tribal Nations. Each tribe has a rich oral and documented history of its settlements, resources and lands and accounts of its movements over time. Many tribes shared territories, as boundaries and property, in the sense of real estate, did not exist.

Does the particular request of the applicant determine whether a Tribal Nation is acting as a contractor or consultant?

If an applicant requests information from a Tribe, the matter of degree of specificity is irrelevant. The Tribe is being consulted and must draw from its information resources in order to respond. This response is not an opinion.

For example, would collocations or applications to site poles in rights of way be less likely to require services outside of the Tribal Nation's statutory role?

No. The Tribe would still act as a consultant for reasons stated above. However, the consultation would in most cases determine that no further work was needed on the part of the Tribe. This caution is necessary because of this possible situation: the original structure (celltower, railroad, highway) was constructed outside Section 106 compliance and therefore the Tribe has had no opportunity to determine its potential impact on cultural resources.

In reviewing TCNS submissions for collocations or for siting poles in rights of way, under what circumstances might a Tribal Nation incur research costs for which it or another contractor might reasonably expect compensation?

A Tribe might incur research costs if the original structure (celltower, railroad, highway) was constructed outside Section 106 compliance and therefore the Tribe has had no opportunity to determine its potential impact on cultural resources.

Paragraph 25.

For example, should the FCC Form 620 and FCC Form 621 be amended to address the cultural resources report that an applicant prepares after completing a Field Survey?

The FCC Form 620 requires contractors to include detailed information from the archaeological or cultural resources survey report. This reporting could be streamlined if the 620 submission required the survey report(s) to be attached, rather than partially extracted in the form.

Additionally, the Commission seeks comment on whether a Tribal Nation's or NHO's review of the materials an applicant provides under the Nationwide Programmatic Agreement (NPA) Section VII is ever, and if so under what circumstances, the equivalent of asking the Tribal Nation or NHO to provide ''specific information and documentation'' like a contractor or consultant would, thereby entitling the Tribal Nation to seek compensation under ACHP guidance and the NPA.

If a Tribe reviews the Applicant's submission packet and responds, as required, during the 30-day review period, the determination of its response to the information requires the application of knowledge and experience and, in many instances, research time. Such work effort entitles the Tribe to seek compensation.

If a Tribal Nation chooses to conduct research, surveying, site visits or monitoring absent a request of the applicant, would such efforts require payment from the applicant?

The NHPA, other Acts and Executive Orders require Tribes and the FCC or its representatives (including contractors) to consult. If an applicant does not consult with Tribes, this is a violation of this standard. The question is therefore moot.

If an archaeological consultant conducted research, surveying, site visits, or monitoring absent a request of the applicant, would the applicant normally be required to pay that contractor or consultant?

If an archaeological consultant is working on behalf of a Tribe and the applicant has not consulted with Tribes, in violation of the NHPA and other Acts and Executive Orders, the question is moot.

Paragraph 26.

Tribal Nations have also indicated that they have experienced difficulties in collecting compensation after providing service as a reason for upfront fee requests. The Commission seeks comment on whether this concern could be alleviated if the Commission clarifies when a Tribal Nation is acting under its statutory role and when it is being hired as a contractor or consultant under the Commission's process. The Commission also seeks comment on whether there might be a more appropriate way to address this concern.

Any time a Tribe is questioned it must draw on its own resources in order to respond (the questions relate to historic and cultural properties, they are never simply opinions); thus, it is being consulted.

Paragraph 27.

27. What steps, if any, can the Commission take to issue the Commission's own guidance on the circumstances in the Commission's process when the Tribal Nation is expressing its views and no compensation by the agency or the applicant is required under ACHP guidance, and the circumstances where the Tribal Nation is acting in the role of a consultant or contractor and would be entitled to seek compensation?

The Tribe in the TCNS process is not “expressing its views” (see highlight above). It is providing specific concrete data derived from traditional cultural resources and modern land management. Such tribal knowledge is not a point of view.

Paragraph 28.

28. To the extent that supplementing current ACHP guidance would help clarify when Tribal fees may be appropriate while both facilitating efficient deployment and recognizing Tribal interests, what input, if any, should the Commission provide to the ACHP on potential modifications to ACHP guidance?

The FCC should school the ACHP on the difference between views/opinions and Tribal knowledge.

Paragraph 29.

How, if at all, does the ‘‘reasonable and good faith’’ standard for identification factor into or temper the amount of fees a Tribal Nation may seek in compensation?

Perhaps there should be a formal Best Practices agreement, established by a Working Group. Lower Brule’s fee structure, based on current industry practice, uses the relative work effort by the Tribe to determine the appropriate fee.

Are there any extant fee rates or schedules that might be of particular use to applicants and Tribal Nations in avoiding or resolving disputes regarding the amount of fees?

The Lower Brule fee schedule.

Paragraph 30.

How does due regard for Tribal sovereignty and the Government’s treaty obligations affect the Commission’s latitude for action in this area?

The Commission should be able to deal directly with Tribes outside the practices of other Agencies. The Lower Brule Sioux Tribe recommends addressing this and all questions asked through the implementation of a Working Group, made up of representative tribal nations, industry representatives, FCC staff and the ACHP.

Paragraph 31.

For example, to what extent would fees at or below the level established by a fee schedule be considered presumptively reasonable?

There needs to be a fee structure that is consistent and is agreeable to all parties involved in the TCNS. Such consistency can be achieved by means of the Working Group proposed above.

Should the fees specified in such a schedule serve as the presumptive maximum an applicant would be expected to pay, and under what circumstances might an upward departure from the fee schedule be appropriate?

Yes, once consistency in the fee schedule is established by mutual agreement of all parties. An exception would be inadvertent discoveries during the archaeological or cultural resources survey that require Tribal involvement. Such situations are common in other forms of archaeological contract work, as it is not possible to predict what lies under the ground and, therefore, how much work effort is required.

In addition to the concepts cited in the prior paragraph, are there other legal principles at play in the resolution of a dispute over a fee that might not arise in the context of merely setting a fee schedule?

Any mutually agreed-upon fee schedule resulting from a proposed Working Group would include dispute resolution.

Have any other Federal agencies formally or informally resolved fee disputes between applicants and Tribal Nations, and if so, under what legal parameters?

Other agencies usually work with Tribes for services by means of a contract or formal agreement that includes dispute resolution. In general such specific undertakings involve larger land areas than cell tower installations, which tend to be less than an acre in size.

How would the Commission establish the appropriate level for fees?

As recommended by Lower Brule, resolution of fee schedules could be accomplished by the proposed Working Group.

How could a fee schedule take into account both regional differences and changes in costs over time, i.e., inflation?

Regional differences do not apply to Tribes. With a few exceptions, they live in similarly distressed situations.

The Commission also seeks comment on whether it should only establish a model fee schedule and whether that would be consistent with the Tribal engagement requirements contemplated by Section 106.

This question would be easily addressed by the proposed Working Group. Lower Brule has only recently established a fee schedule after seven years of participation in the TCNS process. This schedule is based on the relative work effort of the Tribe in responding to specific proposals, rather than a flat fee covering all proposals.

Paragraph 32.

Tribal Nations have increased their areas of interest within the TCNS as they have improved their understanding of their history and cultural heritage. As a result, applicants must sometimes contact upwards of 30 different Tribal Nations and complete the Section 106 process with each of them before being able to build their project.

The geographic area of interest that each Tribe specifies relates to its history of settlement. Very often, a Tribe's original homeland is far from its present location. The reason is that since the 1700s, beginning on the east coast of the United States, Tribal people were forcibly removed to the west from lands they traditionally occupied in order to accommodate Euroamerican settlers.

For the Lower Brule Sioux Tribe, part of the Lakota Nation, the traditional territory was centered in present-day South Dakota, along the Missouri River valley and extended from south of the Great Lakes in present-day Wisconsin, Minnesota and Iowa, west through North Dakota and adjoining parts of southern Canada to the Powder River basin and Yellowstone in Wyoming and Montana, and south to the Platte River basin in southern Nebraska. In a succession of Treaties and Acts they were forced to agree to between 1825 and 1962, Lower Brule land shrunk to its current Reservation, which occupies portions of two counties in central South Dakota, between Fort Pierre and Chamberlain, on the west side of the Missouri River.

The complex movements that characterize Tribal history do not mean that Tribes have lost their history. For thousands of years, Tribes recorded their history in spoken accounts, visual symbols and ceremonies, often using specific places and features of the land as repositories of memory. Very often, such places are far from current Tribal settlements, in some instances, separated by thousands of miles. Thus, for each Tribe, the geographical areas of interest continue to represent the homelands, sources of history and culture, and a considerable part of the knowledge resources that they use in interactions with non-Tribal entities such as the FCC.

The Commission seeks comment on whether it could and should encourage, or require, the specification of areas of interest by county.

All territory proposed for celltower project construction is the traditional territory of a Tribal Nation. Each tribe has a rich oral and documented history of its settlements, resources and lands and accounts of its movements over time. Many tribes shared territories, as boundaries and property, in the sense of real estate, did not exist. Few, if any, Tribes had territories confined to county, or even state, level.

Having said that, each tribe has a reasonable area within which it has current knowledge, and it makes sense to consider the territorial reach in relation to this knowledge. Tribes have to make certain that every celltower proposal is reviewed by at least one Tribe so that no historic Tribal lands are left out of consideration. Not doing so would replay the historic experience of land losses during the Treaty period.

The Commission also seeks comment on whether it should require some form of certification for areas of interest, and if so, what would be the default if a Tribal Nation fails to provide such certification.

The historical territories of Tribes are well documented in historical sources, including oral traditions. If a Tribe claims interest in a territory outside its history and oral traditions this would be outside reasonable practice. This is a job for the Working Group.

Paragraph 33.

33. The Commission seeks comment on whether TCNS should be modified to retain information on areas where concerns were raised and reviews conducted, so that the next filer knows whether there is a concern about cultural resources in that area or not.

This might be a good idea. It would be so much simpler if specific TCNS celltower locations reviewed and rejected by Tribes could be flagged so that the process is not repeated.

To what extent should applicants be able to rely on prior clearances, given that resources may continue to be added to the lists of historic properties?

To the extent the Commission considers allowing applicants to rely on prior clearances, how should the Commission accommodate Tribal Nations' changes to their areas of interest?

The TCNS system is a partnership between the FCC, industry and Tribes. It is therefore appropriate that Tribes be informed of Industry activities, whether or not there have been previous actions in a locality. That is, if a specific locality has been cleared in a previous TCNS submission, a Tribe should still be informed about any new actions. As part of a Best Practices agreement (??), it is reasonable to expect that if a Tribe had no new information, it would not repeat the consultation and, therefore, would not charge a fee.

Paragraph 34.

Is it always necessary to obtain such services from all responding Tribal Nations that request to provide the service, and if so, why?

Yes. It is a damaging stereotype to regard Tribal Nations as similar, or the same. They have common interests, but unique languages, histories, and practices with differences equivalent to, for example, the nations of Europe. With respect to land occupation and use, for example, every Tribe had its own patterns, depending on the nature of the environment and its natural resources, ways of getting food and other necessities, social organization and technology. The only way to recognize their status as Nations is through individual recognition.

Might one Tribal Nation when functioning in the role of a contractor perform certain services and share the work product with other Tribal Nations, e.g., site monitoring?

This is possible, if the Tribes are closely related (e.g. the bands of the Lakota), but only with the consent of the other Tribes in question.

Could an applicant hire a qualified independent site monitor and share its work product with all Tribal Nations that are interested?

How would the Commission ensure that such a monitor is qualified so that other Tribal Nations' interests will be adequately considered?

Should the Commission require that such a monitor meet some established minimum standards?

This is an issue for a proposed Working Group to resolve. Over the last 20 years Tribes have worked with the Federal government to develop qualifications and standards for Tribal Monitors. Cultural materials differ from Tribe to Tribe and the identification of such material may involve more than one Tribe, depending on the location of the celltower project.

The Commission also seeks comment on whether monitors should be required to prepare a written report and provide a copy to applicants.

The Tribe or monitor usually prepares a written report, but these reports are kept confidential as they address sensitive or sacred areas. In the past, such information has been subject to unauthorized use by consulting firms and other parties and for that reason the Tribe does not release it. Verification, if needed, is usually worked out between the individual Tribe and the agency or entity requiring the information.

Paragraph 37.

37. The Commission seeks comment on when it must engage in government-to-government consultation to resolve fee disputes, including when the compensation level for an identification activity has been established by a Tribal government.

Here and elsewhere, it is important to recognize that Tribes are sovereign Nations, not equal to contractors. Government-to-government consultation is therefore appropriate in all instances.

Paragraph 38.

The Commission seeks comment on whether it should continue seeking to develop consensus principles and, if so, how those principles should be reflected in practice. For example, the Commission seeks comment on whether it should seek to enter into agreements regarding best practices with Tribal Nations and their representatives.

The Lower Brule Sioux Tribe recommends addressing all the issues in this Notice through a proposed Working Group made up – on a national or perhaps better a regional basis – of representative Tribes, Industry, FCC staff and NHPA staff.

Paragraph 39.

The Commission seeks comment on what measures, if any, it should take to further speed either of these review processes, either by amending the NPA or otherwise, while assuring that potential effects on historic preservation are fully evaluated.

Usually the first notice to a Tribe has insufficient information for consultation to take place. Once the Applicant responds to the Notification Preferences and supplies a cultural resources survey – which may be weeks or months later – a 30-day time period is appropriate. Contractors often have problems getting the cultural resources surveys completed in a timely manner.

Additionally, if a Tribe is being paid a fee as a consultant or contractor, that Tribe should be held to the timeframe involved in the agreement. This again depends on the nature and extent of work effort on an individual project.

What effect would such proposals have on addressing Section 106-associated delays to deployment?

Should different time limits apply to different categories of construction, such as new towers, DAS and small cells, and collocations?

Have advances in communications during the past decade, particularly with respect to communications via the Internet, changed reasonable expectations as to timeliness of responses and reasonable efforts to follow up?

Lower Brule recommends that all TCNS work be electronic (as in our Notification Preferences). This would cut down enormously on expense and improve response speed.

Paragraph 40.

If the Commission were to permit applicants to self-certify that they have completed their Tribal notification obligations, the Commission seeks comment on how it could ensure that the certifications are truthful and well-founded.

There can be no self-certification under any circumstances. The honor system does not work, as it provides more opportunity for circumventing the required system.

Paragraph 42.

Should there be other conditions on eligibility, such as the nature of the location or the extent of ground disturbance?

Batching is possible where there is little or no ground disturbance (e.g., digging postholes, collocations, antennae on buildings), but for towers requiring extensive ground disturbance, it is impossible to know where buried cultural resources might exist.

Should different time limits or fee guidelines, if any are adopted, apply to batched submissions?

There should be no difference in time limits for the Batch. The issue may be resolved with a fee schedule that reflects relative work effort, such as Lower Brule's.

What changes to the Commission's current TCNS and E–106 forms and processes might facilitate batching?

This is an issue to be resolved by the members of a Working Group.

Paragraph 44.

For example, should the Commission consider new categorical exclusions for small cells and DAS facilities?

This is an issue to be resolved by the members of a Working Group.

Should the Commission revise its rules so that an EA is not required for siting in a floodplain when appropriate engineering or mitigation requirements have been met?

No. Many floodplains are actively eroding and aggrading environments with generally low potential for ancient cultural resources, but each location is different and where streams are relatively stable, cultural resources may exist undisturbed. The information required to resolve the issue is commonly found in,

for example, historic aerial photographs, maps, or through archaeological or other environmental investigations. These sources may demonstrate that a potential celltower location is on land redeposited in historic times by a meandering stream.

Paragraph 47.

The Commission envisions that this proposed exclusion could address replacements for poles that were constructed for a purpose other than supporting antennas, and thus are not ''towers'' within the NPA definition, but that also have (or will have) an antenna attached to them. This exclusion would also apply to pole replacements within rights of way, regardless of whether such replacements are in historic districts.

This seems reasonable. It is something a Working Group can resolve.

Paragraph 49.

49. In addition, since the NPA Order, wireless technologies have evolved and many wireless providers now deploy networks that use smaller antennas and compact radio equipment, including DAS and small cell systems. In view of the changed circumstances that are present today, the Commission finds that it is appropriate to reconsider whether the Commission can exclude construction of wireless facilities in transportation rights of way in a manner that guards against potential effects on historic properties.

Rights of Way tend to lack soil integrity and hence, undisturbed cultural resources, because of construction disturbance and they generally lack the ambience and setting to be considered intact with respect to viewshed. As cultural resources might still survive in such situations, however, the appropriate determination depends on a Tribe's knowledge resources and information provided in specific cultural resources surveys at proposed facility locations. Having said this, disturbances may in many instances occupy a very small space. Such issues are appropriate for a Working Group to resolve.

For example, should the Commission require that poles be installed by auguring or that cable or fiber be installed by plow or by directional drilling?

Augering and plow.

Paragraph 50.

To the extent that utility and communications rights of way on historic properties already are lined with utility poles and other infrastructure, would allowing additional infrastructure have the potential to create effects?

Not with respect to ambience, setting or viewshed.